

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DARRICK L. HUNTER,

Plaintiff,

v.

ELDON VALE, et al.,

Defendants.

NO: 13-CV-0107-JPH

ORDER ADOPTING REPORT AND
RECOMMENDATION

BEFORE THE COURT is a Report and Recommendation issued by Magistrate Judge Hutton on January 27, 2014 (ECF No. 41), recommending that Defendants' motion for judgment on the pleadings be granted. Plaintiff timely filed an objection. ECF No. 42. At the Court's direction, Defendants responded to Plaintiff's objection. ECF No. 44.

Plaintiff's first objection alleges Defendants and Magistrate Judge Hutton improperly relied on a newer version of the DOC grievance program manual, published July 1, 2013, rather than the one published September 11, 2009, which

1 was in effect during the relevant time period (between October 2010 and
2 September 2011). ECF No. 42 at 3-5, Ex. 1 at p. 1; ECF No. 44 at 2. Defendants
3 respond that Plaintiff still has not shown he properly exhausted his administrative
4 remedies. Defendants concede they submitted the 2013 version with their
5 pleadings, but allege it is “not substantially different and does not provide Plaintiff
6 with a valid excuse for failure to properly exhaust his administrative remedies
7 using the offender grievance program.” ECF No. 44 at 3.

8 Defendants are correct. Allegations such as Plaintiff’s were grievable under
9 the earlier version of the Offender Grievance Program. ECF No. 44 at 4,
10 Defendant’s Ex. 1, *Declaration of Clara Curl* at ¶ 3 and Attachment A, Offender
11 Grievance Program Manual dated September 11, 2009; Exhibit 2, *Declaration of*
12 *Dell-Autumn Witten*, ¶ 2 and Attachment A, DOC Policy 550.100, Offender
13 Grievance Program at 5. It is undisputed Plaintiff never filed a grievance with
14 respect to the allegations that form the basis of his complaint. Plaintiff never
15 attempted to file a grievance even after he was informed that his complaint was
16 determined to be non-PREA (Prison Rape Elimination Act). Defendants are
17 correct Plaintiff failed to show administrative remedies were unavailable. *See*
18 *Alibino v. Baca*, 697 F.3d 1023, 1031 (9th Cir. 2012), *reh’g en banc granted*, 709
19 F.3d 994 (9th Cir. 2013); *see also Tuckel v. Grover*, 660 F.3d 1249, 1254 (10th
20 Cir. 2011).

1 Plaintiff's second objection alleges the magistrate judge misstated the record
2 by indicating Plaintiff filed 11 grievances from 2009 to November 8, 2013. ECF
3 No. 42 at 5, *cf.* ECF No. 41 at 7 *with* ECF No. 29-1, Defendants' Ex. 1, *Decl. of*
4 *Clara Curl* at 5. Plaintiff is incorrect. The magistrate judge's date refers to the
5 date Ms. Curl signed her declaration, November 8, 2013. This is not error.

6 The magistrate judge found Plaintiff failed to exhaust all available
7 administrative remedies and failed to show such remedies were unavailable. Such
8 remedies are now unavailable because they are untimely.

9 Having reviewed the Report and Recommendation, the Court hereby adopts
10 Magistrate Judge Hutton's recommendation.

11 **REVOCATION OF *IN FORMA PAUPERIS* STATUS**

12 Pursuant to 28 U.S.C. § 1915(a)(3), "[a]n appeal may not be taken *in forma*
13 *pauperis* if the trial court certifies in writing that it is not taken in good faith." The
14 good faith standard is satisfied when an individual "seeks appellate review of any
15 issue not frivolous." *See Coppedge v. United States*, 369 U.S. 438, 445 (1962).
16 For purposes of 28 U.S.C. § 1915, an appeal is frivolous if it lacks any arguable
17 basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989).

18 The Court finds that any appeal of this Order would not be taken in good
19 faith and would lack any arguable basis in law or fact. Accordingly, the Court
20

1 hereby revokes Plaintiff's *in forma pauperis* status. If Plaintiff wishes to pursue an
2 appeal, he must pay the requisite filing fee.

3 **IT IS HEREBY ORDERED:**

4 1. The Report and Recommendation (ECF No. 41), is **ADOPTED** in its
5 entirety.

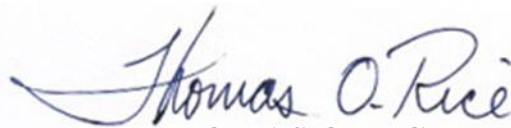
6 2. Defendants' motion for judgment on the pleadings (ECF No. 29), is
7 **GRANTED**. Plaintiff's Complaint is **DISMISSED** with prejudice.

8 3. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal of
9 this Order would not be taken in good faith and would lack any arguable
10 basis in law or fact. Plaintiff's *in forma pauperis* status is hereby
11 **REVOKED**.

12 The District Court Executive is hereby directed to enter this Order, forward
13 uncertified copies to the parties and Magistrate Judge Hutton, and **CLOSE** the file.

14 **DATED** February 26, 2014.




THOMAS O. RICE
United States District Judge